

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

DEBORAH K. SMITH
Thorntown, Indiana

ATTORNEY FOR APPELLEE:

JERALD L. MILLER
Bowman Ksenak & Miller
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RANDY LEE CLARK,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 33A01-0602-CV-69
)	
JILL LYNNE CLARK,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Richard T. Payne, Commissioner
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0007-DR-232

February 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Randy Lee Clark (“Husband”) appeals the trial court’s order on Jill Lynne Clark’s (“Wife”) motion for rule to show cause, which found him in contempt of court for failure to pay certain sums previously ordered and for willful perjury of misstating his gross weekly income to determine child support. He raises four issues, which we consolidate and restate as:

- I. Did the trial court have jurisdiction to modify the mediated settlement agreement and effectively modify Husband’s child support obligation retroactively;
- II. Whether sufficient evidence was presented to support a finding of contempt on the issue of medical expenses and other related expenses; and
- III. Did the trial court abuse its discretion when it awarded attorney fees to Wife.

We affirm.

FACTS AND PROCEDURAL HISTORY

During their marriage, Husband and Wife had two children together, S.C. and N.C. Husband and Wife divorced in June 2001. At that time, the parties submitted a settlement agreement, which was approved by the trial court. On September 9, 2003, the parties entered into a mediated modification agreement (“mediated agreement”), which set out amounts that Husband owed Wife and a timetable for the payment of those amounts. Husband was to pay Wife a total of \$15,124.29, which was to be paid within seventy-five days of the date of the agreement. *Appellant’s App.* at 137-39. The parties also agreed to equally divide their 1999 tax refund. *Id.* Husband was to provide Wife with information regarding the children’s health insurance coverage. *Id.* At the time of the mediated agreement, Husband represented

that his weekly gross income was \$1,397.08. Based on this information, Husband's child support obligation was set at \$266.00 per week relating back to April 4, 2002. *Id.* Husband also agreed to pay an additional \$84.00 per week toward an existing arrearage of \$11,438.00. *Id.* Both parties were represented by attorneys at the mediation and signed the agreement, which was submitted to the trial court and approved.

On December 11, 2003, Wife filed a motion for rule to show cause claiming that Husband had not paid the \$15,124.29 within the required seventy-five days, among other things, as ordered in the agreement. A contempt hearing was held on this motion, but Husband did not appear. The trial court issued an order finding Husband in contempt on December 2, 2004. However, on October 6, 2005, the parties agreed to set aside the trial court's ruling and to again hear evidence on Wife's amended motion for rule to show cause, which was filed on that date.

At this hearing, the parties acknowledged that Husband had paid the \$15,124.29 on January 20, 2004, which was fifty-eight days later than ordered in the agreement. *Tr.* at 6. Evidence was presented that Husband had not paid Wife the one-half of their 1999 tax refund as previously ordered. Additionally, he had not paid the amount of \$1,765.20, which represented S.C.'s 2002 school expenses, as ordered. *Id.* at 9. Wife also argued that Husband owed her approximately \$5,800.00 in uninsured medical expenses. *Id.* at 8. Husband claimed that the explanation of benefits forms showed that the insurance company had paid most of these expenses. *Id.* at 29-30; *Ex. E.* Wife also presented evidence that Husband owed her \$8,697.00 for college expenses for the children. *Tr.* at 22. Wife acknowledged that Husband had a credit for overpaying child support since the emancipation

of S.C., but she contended that it was only \$4,571.00, while Husband argued that it was substantially more. *Id.* at 20-21. Wife additionally presented evidence that Husband had misrepresented his income for the year 2003 and that his tax return for that year reflected a significantly higher income than what he disclosed at the mediation. Husband claimed he was unaware that his income was different from what he submitted to the mediator. *Id.* at 32. The parties agreed that S.C. had become emancipated in August of 2004 and that support should have been reduced at that point. They also agreed to a reduction in support when N.C. began college. Wife also requested that Husband be responsible for repaying her attorney fees, which were shown to be \$11,255.00.

After the hearing, the trial court found Husband was in contempt of court for failure to pay the sum of \$15,124.29 within seventy-five days of the agreement as ordered. *Appellant's App.* at 19. Husband was also found to be in contempt for failing to reimburse Wife for one-half of the 1999 tax refund and for S.C.'s school expenses for 2002. *Id.* The trial court found Husband in contempt for failing to pay \$8,697.00 of the post-secondary educational expenses for the children and for not paying his share of the \$5,800.00 in medical expenses for the children. *Id.* at 19-20. Additionally, Husband was found to be in contempt for his "willful perjury of misstating his gross weekly income to be \$1,397.08, when it should have been sworn to be \$2,204.00 for use in computing the weekly recommended child support obligation." *Id.* at 20.

The trial court then computed the child support amounts that should have been paid by Husband by using the corrected gross weekly income figures that should have been used at the time of the mediation. *Id.* at 20-22. As a result of these computations, it was determined

that Husband had overpaid his child support obligation in the amount of \$4,571.00. *Id.* at 21. Subtracting this overpayment from the other debts owed by Husband resulted in a balance owed of \$7,008.20. *Id.* Husband was ordered to pay this amount in addition to the \$5,800.00 for medical expenses and Wife's attorney fees. Husband now appeals.

DISCUSSION AND DECISION

I. Ability to Modify Agreement

Husband argues that the trial court erred when it modified the mediated agreement by re-computing his child support obligation. He contends that the recalculation of his child support obligation was in violation of Indiana law because courts are prohibited from modifying child support orders retroactively. He also claims that Wife's request for the trial court to re-compute child support exceeded the scope of her motion because she only sought a finding of contempt and not a petition to modify child support.

Indiana law prohibits trial courts from retroactively reducing, modifying, or vacating child support orders. *Payton v. Payton*, 847 N.E.2d 251, 263 (Ind. Ct. App. 2006); *Drwecki v. Drwecki*, 782 N.E.2d 440, 447 (Ind. Ct. App. 2003). Therefore, any order modifying a child support obligation may only relate back to the date the petition to modify was filed and not an earlier date. *Payton*, 847 N.E.2d at 263; *Drwecki*, 782 N.E.2d at 447-48. Here, however, Wife did not file a petition to modify Husband's child support obligation. She filed a motion for rule to show cause, which alleged that, during the mediation, Husband had perjured himself and committed fraud upon the trial court by misrepresenting his income. *Appellant's App.* at 176-81. The relief she sought was not a modification of the child support obligation based on a change in circumstances; instead, Wife sought a correction in

Husband's child support obligation to reflect his actual gross weekly income at the time of the mediation. Therefore, her motion was essentially an Indiana Trial Rule 60(B) motion for relief from judgment based on fraud, misrepresentation, or other misconduct by Husband.

T.R. 60(B) states in relevant part:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment . . . for the following reasons:

- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order, or proceeding was entered or taken for reasons (1), (2), (3), and (4). . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court.

When a party asserts a claim of fraud on the court, the party must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense. *Id.* (citing *In re Adoption of Infant Female Fitz*, 778 N.E.2d 432, 437 (Ind. Ct. App. 2002)). To prove fraud on the court, it is not sufficient to show a possibility that the trial court was misled. *Id.* There must be a showing that the trial court's decision was actually influenced. *Id.*

We construe the Wife's motion for rule to show cause as a request for an independent action for fraud on the court. Wife alleged in her motion that Husband had perjured himself and committed fraud on the court during the mediation when he presented evidence that his gross weekly income in 2003 was \$1,397.08 when it was actually discovered to be \$2,204.00.

Appellant's App. at 179-80. This misrepresentation resulted in the trial court approving the settlement, which included a child support order of \$265.92 per week, when Husband's child support obligation should have been \$325.64 per week. We conclude that the trial court was actually influenced by Husband's misrepresentation, and Husband's acts prevented Wife from requesting the correct amount of child support at the mediation because she was not presented with Husband's correct weekly income. *See Shepherd*, 823 N.En2d at 325. The trial court was within its power to relieve Wife from the original child support order under T.R. 60(B)(3) and to apply Husband's correct weekly income to reach the actual child support obligation that he should have been ordered to pay.

II. Sufficient Evidence for Contempt

Husband contends that the evidence presented at the hearing was not sufficient to support the trial court's finding of contempt on several of the issues. "The determination of whether a party is in contempt of court is a matter within the trial court's discretion and the trial court's decision will only be reversed for an abuse of that discretion." *Norris v. Pethe*, 833 N.E.2d 1024, 1029 (Ind. Ct. App. 2005) (citing *Williamson v. Creamer*, 722 N.E.2d 863, 865 (Ind. Ct. App. 2000)). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it or is contrary to law. *Marks v. Tolliver*, 839 N.E.2d 703, 707 (Ind. Ct. App. 2005); *Norris*, 833 N.E.2d at 1029. When reviewing a contempt order, we neither reweigh the evidence nor judge the credibility of the witnesses. *Marks*, 839 N.E.2d at 707. We review only the evidence supporting the trial court's decision and the reasonable inferences drawn therefrom. *Norris*, 833 N.E.2d at 1029.

“[I]n order to be punished for contempt of a trial court’s order, there must be an order commanding the accused to do or refrain from doing something.” *Id.* To hold a party in contempt for a violation of a court order, a trial court must find that the party acted with willful disobedience. *Id.* The accused party bears the burden of showing that the violation of the trial court’s order was not willful. *Id.*

Husband first contends that there was a valid dispute as to the amount of overpayment credit that existed and that his nonpayment of amounts such as college expenses and other expenses was due to his belief that these amounts had already been paid by this overpayment. He claims that he continued to pay \$266.00 toward his child support obligation and \$84.00 toward an established arrearage through October 6, 2005, the date of the hearing on the motion for rule to show cause, even though S.C. became emancipated in August 2004 and N.C. began attending college at the same time. Although it is true that Husband was entitled to an overpayment credit because of the continued payments after these events, many of the expenses that he has failed to pay had already accrued prior to August of 2004 when S.C. became emancipated and N.C. began attending college. Therefore, he willfully disobeyed the trial court’s order contained within the mediated agreement by not paying these expenses when they became due.

Husband next contends that the evidence was not sufficient to prove that he owed Wife medical expenses and was therefore in contempt for not paying them. At the hearing, there was conflicting evidence presented on this issue. Specifically, Wife presented evidence that the children had uninsured medical expenses that totaled approximately \$5,800.00 and that she had paid these expenses. *Tr.* at 8-9. She testified that the doctors and medical

providers had not received any payment from Husband's insurance company. *Id.* Husband testified that his insurance company had paid all of the submitted medical bills of the children, and he presented evidence of explanation of benefits forms, which purported to show that many of the medical bills had been paid by his insurance company. *Id.* at 29-30. He also testified that he had received a check from the insurance company in the amount of \$350.00, which he had cashed, and had not given to Wife. *Id.* at 30, 44. Husband's argument essentially asks us to reweigh the evidence, which we cannot do. *See Marks*, 839 N.E.2d at 707.

Husband finally claims that the trial court abused its discretion when it found him in contempt for failing to pay the lump sum of \$15,124.29 within seventy-five days of the mediated agreement as ordered. At the hearing, Wife acknowledged that Husband had paid this sum of money, but that the payment was not made until January 20, 2004, which was fifty-eight days after it was due. Husband did not deny that the payment was late. The trial court did not abuse its discretion when it found that Husband was in contempt of court for failing to pay this sum within the seventy-five days as ordered, for failing to pay the medical expenses of the children, and for failing to pay the college and other expenses.

III. Attorney Fees

Husband argues that the trial court abused its discretion when it ordered him to pay Wife's attorney fees. IC 31-15-10-1 states:

- (a) The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs

incurred before the commencement of the proceedings or after entry of judgment.

- (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's name.

A trial court's decision to award attorney fees in connection with a dissolution decree is reviewed for an abuse of discretion. *Thompson v. Thompson*, 811 N.E.2d 888, 927-28 (Ind. Ct. App. 2004), *trans. denied*. "When making such an award, the trial court must consider the resources of the parties, their economic conditions, the ability of the parties to engage in gainful employment, to earn adequate income, and other factors that are pertinent to the reasonableness of the award." *Id.* In its decision to award attorney fees, the trial court may properly take into account misconduct that results in further litigation expenses. *Id.* The trial court need not give its reasons for its decision to award attorney fees. *Id.*

Here, the trial court found Husband in contempt of court for failing to pay a sum of money within the ordered time limit, failing to pay various other expenses that he had been ordered to pay in the mediated agreement, and for committing fraud on the court by misrepresenting his income for child support purposes. All of these actions by Husband resulted in further litigation expenses by Wife in her attempt to get him to pay the amounts he had been ordered to pay through their agreement and to pay the correct amount of child support according to his actual income. The trial court did not abuse its discretion when it ordered Husband to pay Wife's attorney fees.¹

Affirmed.

¹ Wife previously filed a Motion to Strike or Remove a Portion of Record Contained Within Appellant's Appendix. We hereby deny such motion as moot.

RILEY, J., and FRIEDLANDER, J., concur.